JD–53–10
Kalamazoo, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CONTINENTAL LINEN SERVICES, INC.

and

CHICAGO AND MIDWEST REGIONAL
JOINT BOARD – WORKERS UNITED/SEIU

Cases GR-7-CA-52296
GR-7-CA-52715
GR-7-CA-52798

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for the Respondent.

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Kalamazoo, Michigan, on April 13, 2010. The Chicago and Midwest Regional Joint Board – Workers United/SEIU (the Charging Party) filed the charge in case GR-7-CA-52296 on August 5, 2009, the charge in case GR-7- 52715 on February 8, 2010, and the charge in case GR-7-CA-52798 on March 17, 2010. The Regional Director of Region 7 of the National Labor Relations Board (the NLRB) issued the original complaint on November 10, 2009, the amended complaint on November 10, 2009, the consolidated complaint on March 16, 2010, and the second consolidated amended complaint (the complaint) on March 24, 2010.

The complaint alleges that Continental Linen Services, Inc. (the Respondent) refused to bargain in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act): beginning on about April 20, 2009, by refusing to remit to the Charging Party union fees and dues that the Respondent deducted from the pay of employees; beginning on about March 17, 2009, by refusing to meet with representatives of the Charging Party to discuss and process grievances; beginning on about March 17, 2009, by denying the Charging Party's representatives access to the Respondent's facility; beginning on about February 3, 2010, by refusing to meet with the Charging Party to negotiate a successor collective-bargaining agreement; and beginning on about February 23, 2010, by failing and refusing to comply with the Charging Party's request for an updated seniority list. The Respondent contends that as a result of the Joint Board's contested disaffiliation from the international organization known as UNITE HERE, the company

does not know which entity to recognize and forward dues to, and that, in any case, the entity entitled to recognition is not the Charging Party independent of UNITE HERE.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

## Findings of Fact

### I. Jurisdiction

The Respondent, a corporation with an office and facility in Kalamazoo, Michigan, operates a commercial laundry service. In conducting these activities the Respondent annually derives gross revenues in excess of $500,000 and receives at its Kalamazoo facility goods and materials valued in excess of $50,000 directly from points outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.[1]

### II. The History of the Bargaining Unit

Production workers at the Respondent's commercial laundry facility in Kalamazoo, Michigan, have been represented by a union since approximately 1960.[2] For over 20 years of that period, the employees' recognized Section 9(a) bargaining representative was Local 151 of the Laundry and Dry Cleaning International Union (LDCIU). There is no evidence that this, or any other entity, was ever certified by the NLRB as the bargaining representative. As of the time of trial, Barbara Lipsey, a production worker at the Kalamazoo facility, had been the president of Local 151 for 24 years. During some of Lipsey's tenure as president, two other bargaining unit employees – Viola Smith and Ollie Walker – also served as officials of the local union. Lipsey, Smith and Walker were among the Union's negotiators for the 2000-2005 collective-bargaining agreement with the Respondent. In addition, until at least 2005 Lipsey helped employees to prepare and pursue grievances. For a period of 10 or more years ending in 2004, Local 151 also paid an outside contractor – Bob Inman, a business agent with a Teamsters local – to assist with contract negotiations and the processing of grievances. As part

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[1] As is discussed further below, until March 2009, UNITE HERE (Union of Needletrades, Industrial and Textile Employees – Hotel Employees and Restaurant Employees Union) had an intermediate entity known as the Chicago and Midwest Regional Joint Board, UNITE HERE. On March 7, 2009, officials of the Chicago and Midwest Regional Joint Board voted to disaffiliate from UNITE HERE and subsequently affiliated with Workers United and the SEIU to form the current version of the Charging Party. The record indicates that UNITE HERE has taken legal action challenging, and presumably seeking to reverse, the disaffiliation. My finding that the Charging Party is a labor organization is based on the manner in which it is currently operating. I do not make any finding regarding the legality of the disaffiliation from UNITE HERE or the question of whether the Charging Party's identity is substantially the same as that of the Chicago and Midwest Regional Joint Board of UNITE HERE.

[2] The bargaining unit is defined as follows:

> All production employees, including plant clerical employees and janitors, employed by Respondent at its 4200 Manchester Road, Kalamazoo, Michigan facility; but excluding all office clerical employees, salespersons, truck drivers, skilled maintenance employees, and guards and supervisors as defined in the Act.

of this arrangement, Local 151 was permitted to use the union hall of the Teamsters local, and sometimes received assistance from other Teamsters officials when Inman was not available. However, Local 151 was never affiliated with the Teamsters local, but simply paid Inman to assist with representational duties. The Respondent's president is Ron VanderMeer, and its human resources manager is Sarah Wrubel.

During the period from 2002 to 2004, Local 151 was affected by four significant organizational changes made by the labor entities with which it was affiliated. First, on October 1, 2002, LDCIU merged with UNITE. Pursuant to the merger agreement, "LDCIU and all of its affiliated Locals . . . bec[a]me permanently affiliated with UNITE." The merger agreement further provided that UNITE would consider affiliating the former LDCIU locals with the "UNITE Joint . . . Boards in their respective geographic areas." The parties stipulate that after this merger "Local 151 (UNITE)" became the successor union to LDCIU, Local 151, and that the collective-bargaining relationship and the collective-bargaining contract continued with Local 151 as the bargaining representative. At some point prior to February 20, 2003, UNITE directed that Local 151 affiliate with UNITE's Chicago and Central States Joint Board (the Chicago Joint Board). In a letter dated February 20, 2003, an official of UNITE informed the Respondent that Local 151 was the bargaining representative, and that Local 151 had become affiliated with, and would be directly assisted by, the Chicago Joint Board in its dealings with the Respondent. The parties stipulate that this was an accurate statement at the time it was made.

The third organizational change came in May 2004, when UNITE's Chicago Joint Board, merged with UNITE's Midwest Regional Joint Board (the Midwest Joint Board) to form the Chicago and Midwest Regional Joint Board (Joint Board), UNITE. As a result of that action, Local 151 became affiliated with the merged entity. The Joint Board, UNITE, had an office in Chicago, Illinois, and one in Detroit, Michigan. As of March 2009, the Joint Board was servicing approximately 522 labor contracts with employers. The fourth organizational change came in July 2004 when UNITE merged with the Hotel Employees and Restaurant Employees Union, AFL-CIO, CLC (HERE) to form UNITE HERE. By virtue of this merger, each chartered body of either UNITE or HERE became a chartered body of the merged entity, i.e., of UNITE HERE. After the merger, Local 151 was affiliated with both UNITE HERE, and the Joint Board of UNITE HERE.

On July 8, 2004, UNITE HERE adopted a constitution that contains a number of provisions that are relevant to this proceeding and in particular to the question of whether the Joint Board ever became the bargaining representative of the unit employees. The UNITE HERE constitution states that "[a] local may not withdraw from UNITE HERE, go out of existence, dissolve, or join or amalgamate with non-UNITE HERE unions without the prior consent of the G[eneral] E[xecutive] B[oard of UNITE HERE]." UNITE HERE Constitution, Article 5, Section 7. That document also provides some insight into the relationship of the locals, the joint boards, and UNITE HERE. It states that the presidents of UNITE HERE have the authority to direct a local union to affiliate with a joint board, that affiliated local unions "shall remain affiliated with such joint board, unless exempted by the presidents" of UNITE HERE and that the "[j]oint boards shall organize, coordinate and supervise the activities of their affiliated local unions." Id. at Article 6, Section 1 and 2. The UNITE HERE constitution authorizes the joint boards to adopt constitutions, but states that such constitutions must be approved by the presidents of UNITE HERE and are prohibited from conflicting with the constitution or policies of UNITE HERE. The Joint Board has adopted its own constitution, which includes a provision acknowledging that in the event of a conflict the UNITE HERE constitution will control. Constitution of the Joint Board, Article 6. The Joint Board's constitution defines a "local" as "a local union of UNITE HERE." Id. at Article I, Section 2. The document further provides that the

Joint Board, not the affiliated local, has authority to call strikes or work stoppages and to execute collective-bargaining agreements.

Officials of the international organization of UNITE HERE do not appear to have taken an active part in the Joint Board's activities in support of Local 151. The officers of the Joint Board were not directly employed by the international organization of UNITE HERE, did not submit proposed contracts to officials of the international organization of UNITE HERE for review or approval, and did not consult with officials of the international organization of UNITE HERE regarding which grievances to arbitrate.

## III. Local 151 after UNITE HERE Merger

The General Counsel's argument that the Respondent violated the Act relies largely on the contention that after UNITE and HERE merged, Local 151's status as bargaining representative was transferred to the Joint Board of UNITE HERE. The record shows that around the time that Local 151 became affiliated with UNITE and then UNITE HERE, Local 151 stopped using Inman to assist with its representational duties, and officials of the Joint Board stepped into that role. Richard Monje, an employee of the Joint Board, served as lead negotiator for the 2005-2010 collective-bargaining agreement, much as Inman had for past agreements. Lipsey and two union stewards of Local 151 also participated in these negotiations as part of the union negotiating team. Around the time of the merger, Margarita Klein and Sergio Monterrubio, employees of the Joint Board, began assisting Local 151 with employee grievances. Their assistance was more extensive than Inman's had been, and eventually eclipsed Lipsey's role in the formal grievance process. Lipsey continues to help unit members who wish to work out issues with the Respondent informally, but if the unit member decides to file a formal grievance Lipsey will, at most, help prepare the grievance before referring the matter to Klein or Monterrubio.

Lipsey continues to hold the title of president of Local 151, but testified that her duties have become essentially those of a union steward. In the past, Lipsey had been paid for her work on behalf of the Union, but by the time of the UNITE HERE merger, she was no longer being paid. In addition, by the time of the UNITE HERE merger the other two officials of Local 151 left their union positions and neither has been replaced. Since the merger, officials of the Joint Board have named three union stewards – Jose Cabrera, Linda Darner, and Martha Rodriguez. Lipsey testified that the entity she understood was taking over the day to day contract administration during this time was "UNITE HERE," Transcript at Page(s) (Tr.) 156, not the Joint Board. Indeed, Lipsey stated that she had "never really heard much of [the] name" Joint Board until the instant case was initiated. Tr. 167.

Since 2004, Local 151's activities have become more limited. For example – prior to 2005, Local 151 maintained a bank account into which union dues were deposited and out of which the local made payments to the international organization, Inman, and others. However, in 2005 the Joint Board of UNITE HERE began receiving the dues[3] and Local 151 stopped maintaining its own bank account. The Joint Board, UNITE HERE, remitted a portion of the dues to UNITE HERE, but none to Local 151. Since approximately 2005, Local 151 has not held any membership meetings or elections for union officials.

[3] This change is provided for by the 2005-2010 collective-bargaining agreement, which states that union dues deducted from employee wages will be "remit[ted] to the Chicago & Midwest Regional Joint Board, UNITE HERE, . . . Chicago, Illinois."

Following the UNITE HERE merger in 2004, officers of the Joint Board of UNITE HERE administered the collective-bargaining agreement with the Respondent on a day-to-day basis, investigated, filed, and pursued grievances, met with employees at the plant, and met with the Respondent to address employee concerns and discuss the possible resolution of grievances. The Joint Board paid the costs of negotiations, arbitrations, and legal representation involving the bargaining unit.

## IV. Joint Board Votes to Disaffiliate from UNITE HERE

At a meeting on March 7, 2009, delegates from the Joint Board passed a resolution to disaffiliate from UNITE HERE. Then, on March 21, officials of the Joint Board acted to affiliate with Workers United, which in turn merged with the SEIU to form the Charging Party. After the vote to disaffiliate from UNITE HERE, the managers and officers of the Joint Board, UNITE HERE, became managers and officers of the Charging Party. The Charging Party continued to use the same Chicago and Detroit offices that the Joint Board, UNITE HERE, had used before the disaffiliation vote.

Lipsey, the one remaining officer of Local 151, was invited to the March 7 meeting at which the disaffiliation vote was conducted, but she was unable attend. Lipsey was approached by Dan Hammersmith – an employee of the Chicago and Midwest Regional Joint Board – and presented with a document entitled "Motion to Disaffiliate." The document states, inter alia, that "the Executive Board of Local #151" has "convened" and "resolves to disaffiliate from UNITE HERE" and "furthermore, as an affiliate local union of the Chicago and Midwest Regional Joint Board supports the disaffiliation of the Chicago and Midwest Regional Joint Board from UNITE HERE." Lipsey signed the document, but testified at trial, that she was "not sure" she "really read it or understood it."[4]

Within weeks after the Joint Board voted to disaffiliate from UNITE HERE, the Charging Party and UNITE HERE each tried to establish itself as the continuing bargaining representative of the Respondent's unit employees. The Charging Party acted first, sending the Respondent a proposed "Memorandum of Agreement" on March 11, which asked the Respondent to agree to amend the collective-bargaining agreement "to strike any reference to UNITE HERE and to set forth the Joint Board as the exclusive bargaining representative." The proposed agreement stated that "any reference to UNITE HERE is . . . merely a description of the International union with which the Joint Board was affiliated at the time of the most recent collective bargaining agreement." The proposed memorandum of agreement never became effective because the Respondent declined to sign it.

Then the Charging Party sent the Respondent a letter, dated March 16, 2009, which stated that "on March 7, the Chicago and Midwest Regional Joint Board, to which Local 151 is affiliated, disaffiliated from UNITE HERE and became an independent union." The letter asserted that despite this change, "[t]he Joint Board will continue all of its activities as bargaining representative for the employees, including receiving dues . . . and representing bargaining unit employees for grievances and negotiations." The letter asked the Respondent to advise the Charging Party "of any attempts by others to claim to represent your employees." The letter bore the signature of a manager of the Charging Party. It also bore what purported to

[4] Lipsey's testimony at trial supports an inference that she did not understand the nature of the motion she signed. For example, the document states that the motion was adopted pursuant to action by the "executive board" and "officers" of Local 151, but Lipsey testified that she did not know who those terms referred to. Tr. 146-48.

be Lipsey's signature as "Local Union President," but it was revealed at trial that the Charging Party falsified Lipsey's signature on the document without her knowledge. Indeed, Lipsey was unaware of this document until over a year after the Charging Party sent it to the Respondent.

Soon thereafter, UNITE HERE asserted its own claim to be the entity with which the Respondent had a continuing collective-bargaining relationship. John W. Wilhelm – a president of UNITE HERE – stated in a March 26, 2009, letter to the Respondent that "Your collective bargaining relationship is with UNITE HERE and that remains true." The letter warned that although "representatives of the affiliates trying to secede from UNITE HERE . . . may tell you that you must recognize some other union . . . . it would be illegal to do so because you have a continuing obligation to deal with the recognized UNITE HERE affiliate, which remains ready, willing and able to perform all representative functions." The letter explained that UNITE HERE was challenging the disaffiliation in court and that, in any case, if the various joint boards were no longer affiliates of UNITE HERE, the obligation of the local unions to be affiliated with the joint boards had terminated, and the local unions had become "direct affiliates of UNITE HERE International Union, the more common union structure."

Wilhelm, in an April 20, 2009, letter to the Respondent, repeated some of the same points, and told the Respondent to send the dues deducted from employees wages' to "the local union that services your bargaining unit (and *not* to a Joint Board), or place them in an escrow account maintained by your company." (Emphasis in Original). In two subsequent letters, dated June 17 and July 14, 2009, Wilhelm discussed recent events in the dispute between UNITE HERE and the Charging Party and asserted again that the unit employees were "represented by a local union of UNITE HERE" and that it would be unlawful to remit the employees' union dues to the Charging Party. Wilhelm reiterated the suggestion that the Respondent place the union dues deducted from employee paychecks into an escrow account pending the outcome of the intra-union dispute and stated that if the Respondent did this UNITE HERE would not file a claim in court for the dues. Wilhelm stated that the Joint Boards were only "intermediate" labor organizations and that when there is no Joint Board in a local union's area, the local union chartered by UNITE HERE is directly affiliated with UNITE HERE.

The letters from Wilhelm notwithstanding, the record shows that subsequent to the disaffiliation vote, no official from the international organization of UNITE HERE ever sought to schedule bargaining with the Respondent, file a grievance on behalf of a unit employee, or come to the facility to meet with the Respondent or employees.

## V. Respondent Reacts to the Disaffiliation Vote

The Respondent's human resources manager, Wrubel, in a letter dated March 17, 2009, informed the Charging Party that the company was confused about the identity of the collective-bargaining representative given the disaffiliation action by the Joint Board. The Respondent asked the Charging Party to provide information and documents that the Respondent claimed were necessary to help it determine the identity of the bargaining representative. The Respondent stated that it was not refusing to recognize the Charging Party, but rather attempting to ensure that it dealt only with the actual collective-bargaining representative of its unit employees. Regarding a request by the Charging Party to meet about a grievance, the Respondent asked that such a meeting be scheduled for a date after the issues regarding the identity of the bargaining representative had been addressed. The Charging Party responded in a March 30, 2009, letter from its attorney, Ronald Willis. Willis made an argument that the Charging Party was the bargaining representative. He also included a response to the Respondent's requests for information and documents, although this response was largely limited to statements that the information and documents sought were irrelevant or did not exist.

The Respondent took a number of actions based on its uncertainty regarding the identity of the bargaining representative. First, as stated above, it declined the Charging Party's request to meet regarding a grievance and has refused since March 17 to process grievances filed by the Charging Party. Since about March 17, the Respondent has also refused to allow representatives of the Charging Party to enter its premises to meet with employees, investigate grievances, or otherwise represent the bargaining unit employees. After April 20, 2009, the Respondent continued for a time to deduct union initiation fees and dues from the wages of unit employees who had signed authorization cards, and offered employees the opportunity to sign such cards.[5] However, the Respondent did not remit the dues to the Charging Party, but rather, as suggested by UNITE HERE, placed those funds in an escrow account where they remained at the time of trial. The Respondent also declined to provide the Charging Party with lists of the unit employees from whom the dues had been deducted. On April 20, the Respondent filed a petition with the NLRB to clarify the representational status of the unit employees, and, on June 30, the Regional Director issued a letter dismissing the petition. The Regional Director stated that "no question concerning representation exists," but noted that the dismissal did include a determination regarding the question of "whether the Joint Board has actually seceded from UNITE HERE, or whether Local 151 remains affiliated with UNITE HERE."

Subsequently, by letter dated December 23, 2009, the Respondent notified UNITE HERE and the Charging Party that, pursuant to the terms of the collective-bargaining agreement, the company was terminating the collective-bargaining agreement effective upon its expiration. The Charging Party, in a letter dated January 19, 2010, requested that the Respondent commence negotiations for a new collective-bargaining agreement. In a separate letter dated the same day, the Charging Party asked the Respondent to supply an updated seniority list "in preparation for the upcoming contract negotiations." The Respondent's attorney answered these requests in letters dated February 3 and 23, 2010. He stated that as long as the dispute between the Charging Party and UNITE HERE regarding representational status was not resolved, the Respondent would not schedule contract negotiations with either entity.

## VI. Other Documentary Evidence Regarding the Identity of the Bargaining Representative

The parties introduced other documentation that purportedly bears on the question of which entity is the recognized bargaining representative. Unfortunately, that documentation is largely self-contradictory or unclear. One welcome point of clarity is a letter dated February 20, 2003, in which an official of UNITE informed the Respondent that "Local 151 (UNITE)" was the bargaining representative and would be "directly assisted by" the Chicago Joint Board. The parties have stipulated that as of February 20, 2003, this letter was accurate, and that Local 151 was infact the bargaining representative at that time.

The General Counsel and the Charging Party both rely on the 2005-2010 collective-bargaining agreement between the parties as evidence that, by the time that contract was entered into, the Charging Party had taken over from Local 151 as the collective-bargaining representative. However, that document provides what is at best a mixed message. The preamble to the document states that the agreement is between "the Chicago and Midwest Regional Joint Board, UNITE HERE" and the Respondent. However, the contract's signature

[5] The Respondent ceased deducting the dues after the March 1, 2010, expiration of the collective-bargaining agreement.

block makes no mention of the Joint Board, but rather has Monje signing exclusively for "UNITE HERE" as "its bargaining representative." Further clouding matters is the fact that both the cover page of the agreement and a caption at the bottom of each of its 37 pages mention Local 151 as a party to the agreement. This language states that the agreement is between "Chicago & Midwest Regional Joint Board UNITE HERE, Local 151 and Continental Line Services." The agreement also provides that two copies of the seniority list are to be provided "to the Union (one (1) to Local No. 151 Bargaining Committee and one (1) to the International Representative)." This suggests that Local 151 continued to be active as "the Union." There is no reference to the Joint Board in the agreement that is not also accompanied by a reference to UNITE HERE.

Also relied upon by the General Counsel and the Charging Party is a document from December 2007 that is entitled "Agreement to Reaffirm the Collective Bargaining Agreement." This document states that the parties have reviewed the Agreement "in light of current economic conditions" and have found that its terms "inure to the benefit of the workers and the Employer" and therefore "reaffirm that the terms" of the Agreement "remain in full force and effect and incorporate the terms of that Agreement in this Reaffirmation Agreement." The document is signed by Brian Savoca, the Joint Board's Michigan state director, on behalf of "Chicago & Midwest Regional Joint Board, UNITE HERE!" The document makes no reference to Local 151, and also makes no reference to the Charging Party that does not also refer to UNITE HERE. The witnesses did not explain what circumstances led the parties to execute this agreement. I find that neither the language of the agreement itself, nor any other evidence, suggests that this agreement had anything to do with dissolving Local 151 or transferring Section 9(a) representative status from Local 151 and/or UNITE HERE to the Joint Board.

The parties also submitted copies of 72 union cards that unit members signed in order to accept union membership and authorize the Respondent to deduct union initiation fees and dues from their wages. All of the cards signed after the UNITE HERE merger in July 2005, including those signed after the Charging Party's disaffiliation vote, state: "I . . . have voluntarily accepted membership in the Union UNITE HERE, and designated said Union as my bargaining agency in all matters pertaining to wages, hours and other conditions of employment." The top line of text on each of these cards reads "UNITE HERE!" in large letters, and under that, in smaller letters, "Chicago & Midwest Regional Joint Board." A majority of all the cards, including about half of those signed since 2005, make reference to Local 151. Not one of the cards makes reference to the Joint Board independent of a reference to UNITE or UNITE HERE. None of the cards identify the Joint Board as the union in which the employee is accepting membership.

The Respondent submitted copies of other documents to rebut the General Counsel's claim that the Charging Party replaced Local 151 as the recognized bargaining representative after the UNITE HERE merger in July 2004. Among these are four extensions to the effective period of the 2000 to 2005 collective-bargaining agreement. The last of these was executed on February 22, 2005, and extends the agreement until March 19, 2005. All four identify the Union as "Chicago and Midwest Regional Joint Board, UNITE HERE, Local 151 ('UNITE')" and are signed by Monje on behalf of that entity. The Respondent also submitted copies of the business cards that Klein, Monje, Monterrubio, and Savoca used during the relevant time period. All of these have the words "UNITE HERE" in large print along the top of the card, and the words "Chicago and Midwest Regional Joint Board" in smaller print along the left side.

The record also includes copies of checks that the Respondent, prior to the Joint Board's disaffiliation from UNITE HERE, used to transmit the initiation and membership dues deducted from unit employees' pay to the Union. These checks were made payable to "UNITE HERE –

Martha Rucker, 333 South Ashland, Chicago IL 60607." The checks did not mention the Joint Board, but Rucker was an employee of UNITE HERE's Joint Board, and the address given was that of the Chicago office of that entity.

## Discussion

There is no dispute in this case that the Respondent: refused to remit union fees and dues to the Charging Party, refused to meet with the Charging Party over grievances, barred representatives of the Charging Party from the facility where the unit employees worked, refused to meet with the Charging Party to negotiate a successor collective-bargaining agreement, and declined the Charging Party's request for an updated seniority list. What is in dispute is whether the Charging Party was the Section 9(a) representative of the unit employees at the time the Respondent engaged in this conduct and whether the conduct therefore violated the Respondent's duty to recognize and bargain with the collective-bargaining representative of its unit employees. The General Counsel contends that, following the July 2004 UNITE HERE merger, Local 151 ceased to exist in any meaningful way and the Charging Party replaced it as the Section 9(a) bargaining representative. In addition, the General Counsel contends that on March 7, 2009, when the Joint Board voted to disaffiliate from UNITE HERE, the Charging Party's identity did not substantially change and that it, therefore, continued to be the Section 9(a) representative.[6] The Respondent counters that the General Counsel and the Charging party have failed to show that the Joint Board of UNITE HERE ever became the bargaining representative of unit employees. Therefore, the Respondent argues, it does not matter whether the Joint Board's identity stayed substantially the same after the disaffiliation from UNITE HERE.

The General Counsel as the party "asserting that [a Section 9(a)] relationship exists" has "[t]he burden of proving the existence of [that] relationship." *Builders, Woodworkers & Millwrights Local 1 (Glenn Falls Contractors Assn.)*, 341 NLRB 448, 453 (2004). Moreover, since the parties have stipulated that Local 151 (UNITE) was the bargaining representative as of February 20, 2003, the General Counsel also bears the burden of demonstrating that a change in bargaining representative occurred. *Yates Industries*, 264 NLRB 1237, 1248 (1982); see also *Mountain Valley Care & Rehabilitation Center*, 346 NLRB 281, 282 (2006) (party seeking to avoid an otherwise binding bargaining obligation by asserting a change in the bargaining representative bears the burden of demonstrating that change). For the reasons discussed below, I conclude that although the Joint Board of UNITE HERE performed bargaining and other representational activities, the record does not establish that it ever did this as the Section 9(a) bargaining representative itself, as opposed to as an agent of the Section 9(a) bargaining representative. Given the evidence presented at trial, it is just as likely that Local 151 and/or UNITE HERE was the bargaining representative, and that the Joint Board of UNITE HERE acted as the designated agent of the bargaining representative without displacing it.[7]

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[6] See *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143, 147 (2007) ("when there is a union merger or affiliation, an employer's obligation to recognize and bargain with an incumbent union continues unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative"), enfd. 550 F.3d 1183 (D.C. Cir. 2008); see also *Laurel Baye Healthcare of Lake Lanier*, 346 NLRB 159, 160 (2005) ("'[D]isaffiliation, unaccompanied by evidence or offer of evidence of change in organic structure, composition, or leadership of a labor organization does not tend to affect the identity of the organization.'"), enfd. 209 Fed Appx. 345 (4th Cir. 2006).

[7] I find only that the General Counsel has failed to meet its burden of showing, by a preponderance of the evidence, that the Charging Party was the Section 9(a) bargaining

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The record evidence shows that Local 151 increasingly depended on employees of the Joint Board of UNITE HERE to organize, coordinate and supervise its activities, but does not show that Local 151 went out of existence following the July 2004 merger. The Board has placed a high burden on those attempting to establish that a union is defunct. In *Kent Corp.*, 272 NLRB 735 (1984), for example, the Board considered a situation where a labor organization had "no . . . members; no membership applications; no initiation fees; no dues; no treasury; no bank account; no books or records, meetings, or recent (if any) election of officers; and no information available to employees regarding . . . contract negotiations or attempts to enforce the collective-bargaining agreement." Id. at 735-36. Even under those extreme circumstances, the Board refused to find that the labor organization was defunct because an official had testified that the organization was willing to continue to represent the unit employees, and because there was no evidence that the organization "was called on and failed to act on unit employees' behalf." The decision about a labor organization's willingness and ability to represent employees is made "regardless of the relative inactivity of a labor organization." *Kent*, 272 NLRB at 736.

In the instant case, the evidence does not show that Local 151 took any overt action to dissolve itself or transfer its status as bargaining representative to another entity. To the contrary, the record shows that, UNITE HERE's president, in a letter dated March 26, 2009, stated that its recognized affiliate remained "ready, willing and able to perform all representative functions" at the Respondent's facility. The record shows that, after the July 2004 UNITE HERE merger, Local 151 continued to be an active participant in negotiations for a new collective-bargaining agreement. In particular, Lipsey, the president of Local 151, and two Local 151 union stewards were on the union bargaining team that negotiated the most recent collective-bargaining agreement. That agreement was not executed until October 27, 2005 – 15 months after the merger that the General Counsel contends sounded the death knell for Local 151. In the interim, the parties executed extension agreements that identified the bargaining representative as "Chicago and Midwest Regional Joint Board, UNITE HERE, Local 151." When a successor agreement for the 2005 to 2010 period was reached, every page of the agreement identified Local 151 as a party. In addition, after the 2004 merger, Lipsey continued to meet with the Respondent on behalf of unit employees in order to resolve disputes with the company. Following the July 2004 merger, Lipsey also helped when a unit employee wanted to prepare a formal grievance, although personnel of the Joint Board of UNITE HERE assumed all responsibility for pursuing formal grievances.

Not only does the record show that Local 151 continued to engage in representational activities after the July 2004 merger, but it is also clear that it continued to exist as an entity under the UNITE HERE constitution. The UNITE HERE constitution provides that Local 15 "may not . . . go out of existence" or "dissolve" without the "prior consent" of UNITE HERE's General Executive Board. The General Counsel has not shown that UNITE HERE ever authorized Local 151 to go out of existence and, based on the record here, it is fair to infer that UNITE HERE did not do so. Thus, pursuant to the UNITE HERE constitution, Local 151 continues to exist as a local union chartered by UNITE HERE. The UNITE HERE constitution is significant evidence since the question of which entity is the Section 9(a) representative largely hinges on how one construes the relationships between Local 151, the Joint Board and UNITE HERE, and the UNITE HERE constitution defines those relationships.[8]

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representative at the relevant time. This should not be interpreted as encompassing a finding that any particular entity was, or was not, the Section 9(a) representative.

[8] The constitutions of both UNITE HERE and the Joint Board provide that the UNITE HERE

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The evidence also shows that others viewed Local 151 as an active entity after the July 2004 merger. Most notably, the Joint Board itself took actions in which it treated Local 151 as a continuing player in the representation of unit employees. For example, the Joint Board invited Lipsey to attend the disaffiliation meeting in March 2009, and an employee of the Joint Board sought out Lipsey and urged her to sign a disaffiliation motion on behalf of Local 151's Executive Board.[9] Similarly, when, by letter of March 16, 2009, the Charging Party informed the Respondent that it had disaffiliated from UNITE HERE but planned to "continue all of its activities as bargaining representative," it made a point of claiming that Local 151 was affiliated with the Charging Party, and included a signature line for the president of Local 151. Indeed, the Charging Party considered it so important to give the impression that this letter represented the position of Local 151 that, as discussed earlier, it went so far as to falsify Lipsey's signature on the document. Similarly, record evidence supports the view that employees were under the impression that Local 151 continued to exist as an entity that had a role in their representation. The majority of the union cards that the unit employees signed to authorize the Union to act as their representative made reference to Local 151, and this includes handwritten reference on about half of the cards signed from the time of the UNITE HERE merger on July 9, 2004, until the time of disaffiliation vote on March 7, 2009.

In reaching the conclusion that the General Counsel has failed to show either that Local 151 is defunct or that it has been replaced as the bargaining representative, I considered the evidence that, by 2005, employees of UNITE HERE's Joint Board were performing most of the representational duties of Local 151. However, that does not mean that the Joint Board had supplanted Local 151 as bargaining representative. A collective-bargaining representative has the right to choose whomever it wants to represent it, *Nevada Security Innovations, Ltd.*, 341 NLRB 953, 955 (2004); *Goad Co.*, 333 NLRB 677, 679-80 (2001), and this includes the right to confer authority to act in its behalf upon the officers and members of another labor organization. *National Upholstering Co.*, 311 NLRB 1204, 1208 n.7 (1993). A bargaining representative's delegation of duties to an agent does not, however, transfer Section 9(a) status to the agent that acts pursuant to the delegation. See, e.g., *Mountain Valley Care & Rehabilitation*, 346 NLRB at 281-82, *Nevada Security*, 341 NLRB at 956, and *Sherwood Ford*, 188 NLRB 131, 133-34 (1971). To the contrary, if Local 151 and/or UNITE HERE had delegated functions to such an extent as to constitute a transfer of Section 9(a) representational status to the Joint Board, that transfer would be void and the Respondent would not violate the Act by refusing to bargain with the Charging Party. See, e.g., *Nevada Security*, supra, *Goad Co.,* 333 NLRB at 677 n.1 and 679-80, and *Sherwood Ford*, supra; see also *Reading Anthracite Co.,* 326 NLRB 1370, 1371 (1998) (a bargaining representative may delegate its representational duties, but not its representational responsibilities). As the General Counsel acknowledges in its brief, such a transfer would be void because only employees have the statutory power to confer Section 9(a) status on a chosen representative. Brief of General Counsel at Page 16.

Even if the evidence showed that Local 151 was defunct, the General Counsel would still not have proven a violation since the record does not show that the Joint Board was the entity that would have replaced Local 151 as the bargaining representative. Based on the record evidence it is at least as likely that, if Local 151 ceased to function as the bargaining representative, UNITE HERE was the successor collective-bargaining representative and the Joint Board merely an intermediate union to which UNITE HERE had delegated

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constitution is the superior, controlling, document.

[9] As discussed earlier, Lipsey signed this document but her testimony indicated that she did not understand, and may not have even read, it.

representational duties. It is true that the individuals who performed those representational duties were employed at the Joint Board level, and were not members of UNITE HERE's international staff, but under the precedent discussed above that does not mean that those individuals were performing the work as officials of the Joint Board as bargaining representative, rather than as agents of UNITE HERE. See, e.g., *Mountain Valley Care & Rehabilitation*, supra, *Nevada Security*, supra, and *Goad*, supra. Indeed, the record indicates that Monje, Klein, Monterrubio and the other individuals employed at the Joint Board level were seen by Local 151 and the unit members as agents of UNITE HERE, rather than as officials of the Joint Board acting as bargaining representative. Lipsey testified that her understanding was that the entity that had taken over the day-to-day contract administration was "UNITE HERE," not the Joint Board. Indeed, Lipsey testified that she had "never really heard much" about the Joint Board until the instant dispute arose. This is consistent with the business cards used by Monje and other employees of the Joint Board of UNITE HERE, which reference UNITE HERE more prominently than they do the Joint Board. Similarly, the union authorization cards that bargaining unit employees signed during this period specifically state that the bargaining representative the employees were authorizing was "UNITE HERE," not the Joint Board. There is no evidence that prior to the disaffiliation any unit member was operating under the understanding that the Joint Board had become his or her bargaining representative, or that any unit member had authorized the Joint Board to do so. Indeed, even the Joint Board's own constitution defines a "local" as "a local union of UNITE HERE," not of the Joint Board.

The Respondent argues that the Charging Party's actions in March 2009 – including the request that the Respondent agree to strike all references to UNITE HERE from the collective-bargaining agreement, the presentation to Lipsey of a disaffiliation motion for Local 151, and the falsification of Lipsey's signature on the Charging Party's March 16 letter to the Respondent – "demonstrate an attempt to contrive exclusive 9(a) status at or near the time of the disaffiliation." Brief of Respondent at Page 19. The Respondent further argues that "if exclusive 9(a) status was clearly established as early as 2005, there would be no need" for such actions and that those actions therefore "act as admission that the conduct and documents that the General Counsel and the [Charging Party] now rely on to establish 9(a) status are insufficient." I agree to the extent that I view these actions by the Charging Party as part of last minute effort to generate evidence in support of its claim to be the exclusive bargaining representative at the time of the disaffiliation. This effort suggests that the Charging Party had doubts that what had happened prior to March 2009 was sufficient to transfer exclusive bargaining representative status to the Joint Board.

The General Counsel's argument that the Joint Board had become the bargaining representative well before March 2009 relies heavily on language in the 2005-2010 collective-bargaining agreement and the December 2007 reaffirmation of that agreement. Examination of the collective-bargaining agreement shows that it provides, at best, a mixed message regarding the identity of the bargaining representative. The General Counsel makes its argument by focusing narrowly on the opening paragraph of the collective-bargaining agreement. That paragraph states that the agreement is between "the CHICAGO and MIDWEST REGIONAL JOINT BOARD, UNITE HERE . . . and CONTINENTAL LINEN SERVICES." The General Counsel contends that this language means that the Joint Board was the bargaining representative, and that UNITE HERE was merely an entity with which the Joint Board was affiliated at the time. However, even if this were the only relevant language in the contract, it would not be persuasive support for the General Counsel's position because the language can also reasonably be read as referring to UNITE HERE as the bargaining representative and to the Joint Board merely as an agent affiliated with UNITE HERE. Cf. *Vermont Marble Co.*, 301 NLRB 103, 103 n.1 (1991) (language referencing both the locals and the international union does not establish that the locals were the bargaining representatives because that language is

equally consistent with finding that the international union was the bargaining representative and that the locals were the internationals' agents, not the representatives in their own right).

Looking beyond the portion of the collective-bargaining agreement relied upon by the General Counsel, I find that the contract not only fails to establish that the Joint Board became the collective-bargaining representative, but that the contract is more reasonably read as indicating that UNITE HERE became the bargaining representative. Specifically, the signature block of the contract makes no reference at all to the Joint Board. Rather the contract is executed by Monje on behalf of "UNITE HERE." This supports the view that if any entity had replaced Local 151 as the bargaining representative that entity was UNITE HERE, not the Joint Board. See *National Upholstering Co.*, 311 NLRB at 1204-05 (local union was not a party to collective-bargaining agreement even though contract made reference to the local union and an official of local union signed the agreement, where the signature block provides that the official was acting as an agent of the bargaining representative when he signed).

The General Counsel's argument based on the contract language is further undercut by the way that the parties to the agreement are identified on the cover page and at the bottom of each page of the contract. These portions state that the agreement is between the employer and "Chicago and Midwest Regional Joint Board Unite Here, Local 151." This indicates that the parties saw Local 151 as an ongoing entity and weighs against acceptance of the General Counsel's contention that Local 151 was defunct. The same understanding is communicated, perhaps even more clearly, by the language in the contract stating that two copies of the seniority list are to be provided "to the Union (one (1) to Local No. 151 Bargaining Committee and one (1) to the International Representative)."

To sum up, the 2005-2010 collective-bargaining agreement, far from establishing by a preponderance of the evidence that the Joint Board had become the exclusive bargaining representative, can most reasonably be read as indicating that Local 151 might still be the bargaining representative and that, if any entity had replaced it, the new entity was UNITE HERE. Certainly, the collective-bargaining agreement does not outweigh the other evidence, discussed above, which favors finding that the General Counsel has failed to show that the Joint Board ever became the exclusive bargaining representative.

The General Counsel and the Charging Party also argue that the "Agreement to Reaffirm the Collective Bargaining Agreement" that was executed in December 2007 shows that the Joint Board had become the bargaining representative. No evidence besides the reaffirmation document itself was presented to explain the affirmation agreement or its intent. The reaffirmation agreement identifies the parties as the employer and "Chicago & Midwest Regional Joint Board, UNITE HERE!" This is essentially the same way that the parties were identified in the opening paragraph of the collective-bargaining agreement itself. As discussed above, that language can be read as indicating either that the Joint Board had become the bargaining representative (and that reference to UNITE HERE merely acknowledges the affiliation), or that UNITE HERE had become the bargaining representative (and that reference to the Joint Board merely acknowledges the agent affiliated with UNITE HERE). Thus this language, especially when considered with the evidence of how the same language was used in the collective-bargaining agreement, fails to provide support for the General Counsel's contention that the Joint Board's role had been elevated from that of the bargaining representative's agent, to that of the collective-bargaining representative itself.

The General Counsel also argues that any challenge to the Charging Party's claim to be the bargaining representative is untimely because that challenge comes outside the 6-month limitations period under Section 10(b) of the Act. It contends that if an exclusive bargaining

representative transfers its Section 9(a) status to another labor organization, the employer must make any challenge to that transfer within the 6-month limitations period under Section 10(b). Brief of General Counsel at Page 17.[10] This argument is not persuasive for at least two reasons. First, as discussed above, the General Counsel has failed to show that Local 151, UNITE HERE, or any other entity, transferred Section 9(a) bargaining status to the Joint Board, or that the Joint Board was otherwise elevated to the position of bargaining representative. As the General Counsel concedes, there was no agreement between Local 151 and the Joint Board to transfer status as bargaining representative. Brief of the General Counsel at Page 18. There was, in other words, no action that the Respondent had an opportunity to challenge within the Section 10(b) period. All the record evidence shows is that the bargaining representative delegated representational duties to its chosen agent – something that the bargaining representative was entitled to do and to which the Respondent did not have a valid objection.

Even assuming that the General Counsel had succeeded in showing that Local 151 and/or UNITE HERE transferred Section 9(a) status to the Charging Party, the 6-month limitations period would not have started to run until the Respondent received "clear and unequivocal" notice of the transfer. *RPC*, Inc. 311 NLRB 232, 234-35 (1993) (Section "10(b) period commences only when a party has clear and unequivocal notice of the action giving rise to an alleged violation of the Act."); see also *Mine Workers Local 17*, 315 NLRB 1052 (1994) (Section 10(b) period is tolled until there is either actual or constructive notice of the alleged unfair labor practice.). The record does not show that, prior to receiving the Charging Party's letter of March 16, 2009, the Respondent had been notified of the supposed transfer of Section 9(a) representative status from Local 151 and/or UNITE HERE to the Charging Party. Even then the Respondent only had notice that the Charging Party was claiming that Section 9(a) status had been transferred to it – not notice that Local 151 and/or UNITE HERE was claiming to have made such a transfer. To the contrary, UNITE HERE denied that Section 9(a) status had been transferred to the Charging Party and warned the Respondent that treating the Charging Party as the bargaining representative would be unlawful. In addition, Lipsey, the only officer of Local 151, stated that she had hardly even heard of the Joint Board prior to the instant dispute, and thus it is fair to infer that Local 151 did not notify the Respondent that it was transferring Section 9(a) status to the Joint Board. Given that no bargaining representative notified the Respondent that it was transferring Section 9(a) status to the Joint Board, I believe that at the time of trial the Respondent still had not received notice of an attempted transfer of such status, and certainly had not received notice prior to the 6-month limitations period.

At any rate, the Respondent did not wait 6 months to challenge the Charging Party's March 2009 assertion that it had become the collective-bargaining agreement. To the contrary, in a March 17 letter, the Respondent expressed doubts about the Charging Party's claim to be the exclusive bargaining representative and asked the Charging Party to supply information that would help the Respondent resolve those doubts.

The General Counsel claims that by early 2005 the Respondent had notice that Section 9(a) representational status had been transferred to the Charging Party because by that time the Joint Board was performing all representational duties. This argument fails as a matter of

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[10] In support of this proposition, the General Counsel cites *Machinists Local Lodge 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 416-17, 419 (1960); *Raymond F. Kravis Center*, 351 NLRB at 144 and fns. 8 and 9; *Alpha Associates*, 344 NLRB 782, 783 (2005). However, at least one decision rejects the notion that Section 10(b) precludes the use of pre-limitations period bargaining history to determine which entity is the bargaining representative. *Mountain Valley Care & Rehabilitation*, 346 NLB at 282-83 and 289-91.

both fact and law. As discussed above, the record indicates that after early 2005, Local 151 was an active participant in contract negotiations. It also continued helping employees to work out disputes with the employer, although it generally did this through informal meetings between Lipsey and the Respondent rather than through formal grievances. Under the contract, Local 151 continued to be entitled as "the Union" to receive seniority lists from the Respondent. Moreover, after 2005, the Charging Party took actions that presented Local 151 to the Respondent as an entity with continuing representational responsibilities. For example, the Charging Party's March 16, 2009, letter to the Respondent regarding the disaffiliation from UNITE HERE was presented as coming from both the Charging Party and Local 151. Similarly, the Respondent prepared a disaffiliation motion by which Local 151 ostensibly expressed its support for the disaffiliation. Thus the record does not show that, outside the 6-month charging filing period, the Joint Board had taken over all representational duties from Local 151, and certainly does not show that the Respondent would reasonably have understood that such a takeover of duties had occurred. The General Counsel's argument also fails as a matter of law since even if Local 151 is seen as having delegated its representational duties to the Joint Board that delegation would not legally constitute a transfer of Section 9(a) representational status to the Joint Board. See, e.g., *Mountain Valley Care*, supra, *Nevada Security*, supra, *Goad Co.*, supra., *Sherwood Ford*, supra.

The General Counsel argues that the 2005-2010 collective-bargaining agreement and the Agreement to Reaffirm the Collective Bargaining Agreement show that, outside the limitations period, the Respondent had recognized, or acquiesced in, the transfer of Section 9(a) representational status to the Joint Board. This argument is not persuasive. As discussed above, the collective-bargaining agreement does not give notice of such a transfer since it fails to establish that Local 151 ceased to be the Section 9(a) bargaining representative and also indicates that if that status had been transferred the most likely recipient was UNITE HERE, not the Joint Board. Similarly, the language of the reaffirmation agreement does not rebut UNITE HERE's claim that the Respondent's bargaining relationship was with UNITE HERE, not the Charging Party. Thus, neither of these documents gave the "clear and unequivocal" notice necessary to start the limitations period running.

For the reasons stated above, I find that the General Counsel has failed to establish by a preponderance of the evidence that the Charging Party ever became the collective-bargaining representative of unit employees. The Respondent therefore, was not shown to have violated the Act when, confronted with the competing claims to representative status by the Charging Party and UNITE HERE, it refused the Charging Party's attempt to bully it into taking sides against UNITE HERE. Since the General Counsel has not shown that the Respondent was required to recognize and bargain with the Charging Party, it has not shown that the Respondent's failure to do so in the respects alleged in the complaint was a violation of Section 8(a)(5) and (1) of the Act. Moreover, given that during the relevant time period the Charging Party was operating independently of UNITE HERE, the General Counsel has failed to show that the Charging Party was an agent of the collective-bargaining representative for purposes of compliance with any terms or conditions of the collective-bargaining agreement. Therefore, the complaint in this case should be dismissed in its entirety.

## Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The evidence does not establish that the Charging Party was the Section 9(a) bargaining representative of the unit employees.

4. The record does not show that the Respondent violated Section 8(a)(5) and (1) when it: refused to pay union fees and dues to the Charging Party; refused to meet with representatives of the Charging Party to negotiate a collective-bargaining agreement or process grievances; denied the Charging Party's representatives access to the Respondent's facility; and refused to comply with the Charging Party's request for an undated seniority list.

## ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 15, 2010

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PAUL BOGAS
Administrative Law Judge